SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 58

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF.

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May 20, 1969.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1101.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

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1. **The issue presented.** The Statement of the Question presented in the Brief in Opposition (Def. Br., p. 1) obscures the basic issue in this case. The claimed dispute between the parties as to the meaning and application of a collective bargaining agreement is non-existent.

The controlling issue is whether a federal court has jurisdiction under Sec. 2, Seventh of the Railway Labor Act to ban a flouting of a collective bargaining agreement. Sec. 2, Seventh forbids changes in rates of pay, rules or working conditions except in the manner prescribed in Sec. 6. This Court has long held that injunctive relief lies to enforce Sec. 2, Seventh (See *Virginian* and the many other cases cited in n. 2, p. 10 of our Petition).

We ask now that this Court consider whether such relief lies for the flouting of a labor contract. Several Courts of Appeal have so ruled (*Manning,* Second Circuit, 1964; *United Industrial,* Fifth Circuit, 1965, and see the other cases cited in n. 2, pp. 10-11 of our Petition).

We feel justified to say the defendant flouted the agreement. The questions of the National Diesel Agreement, the Arbitration Award, the Full Crew Law, etc., were all litigated between the very parties now at bar and final judgment rendered. Thereafter the defendant refused to employ a fireman on a job assignment. Petitioner sought injunctive relief. Both courts below held that the dispute was "minor", thus relegating BLF&E to a tribunal where it will be required again to litigafe the very issues already litigated (and before a tribunal years behind in its docket) and to face another exhausting round of appeals.

2. **The claimed plant switching exemption.** The defendant recognizes the res judicata effect of *Bangor* (Def. Br., p. 8, Fn. 1, p. 9) that the National Diesel Agreement continues in effect after the expiration of the award in full crew law states. Having made this inescapable concession, the defendant lamely asserts, for the first time in this litigation, that the "State of Indiana has never sought to apply the Indiana full crew law to EJ&E's plant switching locomotives since the law was enacted in 1937" (Def. Br. p. 9, Fn. 2). This assertion is without a scintilla of support in the record. It is belied by the fact that the defendant found it necessary to make a collective agreement with the Brotherhood of Railroad Trainmen, to reduce the crew below the size specified in the Indiana Full Crew Law, with respect to the very assignment here in dispute. In a feeble effort to buttress its new contention, defendant cites *Cooperative Legislative Com.* v. *Public Utilities Commission,* 80 N. E. 2d 159 (Def. Br., p. 9). That case involved an interpretation of the Ohio Full Crew Law which con-

tained a specific exclusion of "private railroads not doing business as common carriers." No such exclusion exists in the Indiana Full Crew Law (Burns Ind. Stat. Anno., ¶ 55-1330, 55-1331).

3. **The deadman's controls case.** Defendant cites *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook R. Co.*, ... F. 2d ..... (No. 20,909, D. C. Cir., 1969) (Def. Br., p. 10), and reprints the decision in its Appendix. This most recent decision of the Court of Appeals reiterates the holding of that court that the National Diesel Agreement remains in force in states with full crew laws. But the holding in that case has no relevance here. The issue there was whether firemen could be removed from engines first equipped with dead man's controls after the award expired (The award required such controls as a condition of removal). The court held that the work rule established by the award was that firemen would not be required if engines were equipped with dead man's controls, and if a carrier puts dead man's controls on an engine after the award expires, the work rule authorizes the operation of the locomotive without the firemen.

4. **The alleged need for administrative interpretation.** The defendant quotes (Def. Br. 10) a portion of the *Bangor* decision which refers to the interpretive authority of Arbitration Board 282. Preceding this quotation, it makes the startling assertion that the *Bangor* court "recognized the continuing use and need for administrative agencies charged with the function of interpretation of collective bargaining agreements in the event of disputes between the parties to them" (Def. Br., p. 10).

This argument overlooks a key point: here there is no dispute over the meaning of a contract. The sole issue is whether the contract, in this case the National Diesel Agree-

ment, was modified in Indiana. The parties, including the defendant, could not and did not entrust that issue to an administrative agency. That issue they litigated in the courts. It was not until after the court ruled against the defendant and the other railroads on the basic issue that they made repeated efforts to secure in effect a reversal of the courts' decision on the full crew issue by securing an interpretation by Arbitration Board 282. The Board has declined to issue such interpretation.[1]

Defendant cites *Brotherhood of Railroad Trainmen* v. *Terminal Railway Assn. of St. Louis*, 380 F. 2d 584 (D. C. Cir., 1967), for the apparent purpose of indicating that the Court of Appeals intended Arbitration Board 282 to act as a continuing interpretive agency. This case does not support the defendant's position. That case holds simply that the Board may "determine the boundaries of rights, privileges and obligations of the parties *with respect to the two year period specified*" by the Public Law 88-108 and the award (p. 590). This it holds by reason of Public Law 88-108 which provides that Sections 7, 8 and 9 of the Railway Labor Act shall be applicable to Arbitration Board 282 (380 F. 2d 584 at 590) (Emphasis supplied).

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1. The last effort was a carrier telegram of April 17, 1968 to the National Mediation Board: "If the Board answers the questions in April 8th Tracy letter in manner we expect, we understand the United States Court of Appeals for the District of Columbia Circuit has power to recall its mandate in the *Bangor and Aroostook* case to consider the effect of those answers on its decision and the Supreme Court has power to reconsider its denial of certiorari." On June 29, 1968, Arbitration Board 282 was reconvened, declined to render any opinion, and stated "Insofar as these questions are not answered by the Award or by the Board's prior interpretations they pose issues relating to the effect of the Award on the National Diesel Agreement, which neither arose during the period of the Award nor concern its application during that period and which have been finally determined by the courts. We do not think that it would be consistent with the intent of Congress as expressed in Public Law 88-108 for us to take jurisdiction over these questions."

5. **Inapplicability of defendant's authorities.** The cases cited at pp. 6-8 of defendant's brief are clearly inapplicable. Defendant's reliance on these cases rests on the false assumption throughout its brief that the National Diesel Agreement was modified in Indiana. The assertion (Def. Br., p. 3) that at the hearing on plaintiff's motion for preliminary hearing it was established that the National Diesel Agreement was modified as to the EJ&E by the Award of Arbitration Board 282 is without support in the record. The District Court found merely that the Railroad had made a "good faith" claim to such a defense which under the theory of that court made the dispute "minor" and subject to resolution by the National Railroad Adjustment Board.

The finding at most was a conclusion of law, which in the light of the res judicata effect of *Bangor,* was erroneous.

Conclusion.

This case presents vital issues under the Railway Labor Act. It is another illustration of the manner in which the "minor dispute" label is pasted on a dispute thus foreclosing a union from *any* effective relief from wrongful carrier action. We ask that certiorari be granted and the judgment reversed *per curiam.*

Respectfully submitted,

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